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No. 84-1736

Supreme Court, U.S.
FILED
NOV 21 1985
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

MIGUEL HIJAR, SUPERINTENDENT, FEDERAL PRISON CAMP AT BORON, CALIFORNIA, PETITIONER

v.

JAMES ROBERT BURRUS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES SUGGESTING MOOTNESS

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MEMORANDUM FOR THE UNITED STATES SUGGESTING MOOTNESS

This case presents the question whether the warden at a federal prison in California where respondent was incarcerated was properly enjoined from honoring a detainer filed by the State of Arizona. Respondent brought this action to prevent the warden from complying with a request by Arizona under the Interstate Agreement on Detainers (IAD), 18 U.S.C. App. 2, for temporary custody of respondent so that the State could try him on fraud charges pending there. On March 7, 1983, the United States District Court for the Northern District of California entered a permanent injunction prohibiting the warden from recognizing or giving effect to the detainer and from transferring respondent to

the custody of Arizona (Pet. App. 22a-24a).[1] On September 25, 1984, the Ninth Circuit affirmed the judgment and the permanent injunction (*id.* at 1a-20a). The government petitioned for a writ of certiorari, which this Court granted on October 7, 1985.

While the instant litigation was proceeding, respondent filed on November 9, 1984, an entirely separate action in the Central District of California, where he was then incarcerated, challenging the calculation of his parole release date with respect to his federal sentences.[2] Subsequent to the time this Court granted review, we learned that respondent had been ordered released from federal custody on September 26, 1985, by a magistrate in the Central District of California in connection with respondent's action in that district. The halfway house in Phoenix, Arizona—where respondent was living—obeyed this order on September 27. Because, as we also learned when we investigated the circumstances giving rise to his release, respondent was in any event scheduled to be paroled on October 5, 1985,[3] the Central District case now concerns

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[1]In doing so, the court apparently concluded that Article III(d) of the IAD barred respondent's trial in Arizona because the State, having previously obtained his custody under the IAD, had failed to try respondent before returning him to the federal penitentiary (see Pet. App. 23a).

[2]Specifically, respondent's suit involved whether "split sentences" (see 18 U.S.C. 3651) should be "aggregated" (see 18 U.S.C. 4161, 4205(a); 28 C.F.R. 2.5) with other consecutive sentences for the purpose of calculating parole eligibility and good time credit.

[3]At the time our petition was filed, in the beginning of May 1985, this case was of course not moot, nor was it clear that it would become moot before the Court decided it—respondent's parole date could have been deferred, or the Court might have rendered a summary decision before recessing for the summer. Had we known of respondent's anticipated parole date prior to this Court's action on the petition, we would of course have advised the Court of that fact. Still, because of our belief that the court of appeals had decided an important issue in an incorrect

only an eight-day period of incarceration. The Bureau of Prisons has concluded that, even were the government to prevail on the merits in the Central District case, respondent's re-imprisonment for the eight unserved days prior to his scheduled parole would be pointless and that respondent, having now been released, will not be reincarcerated. Accordingly, a motion is being filed to dismiss the Central District case as moot.

Thus, respondent is not now imprisoned and will not be re-imprisoned unless he commits a new offense or violates his parole conditions.[4] "Imprisonment" is, however, a prerequisite for Arizona's detainer to have effect under the IAD; if respondent is not incarcerated in a federal prison, federal prison officials have neither the duty nor the right under the IAD to "deliver" him for trial in Arizona.[5] We

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manner that would have substantial adverse repercussions in future litigation, we would have maintained our petition and requested, as we now do, that the Court vacate the decision of the court of appeals.

[4]The possibility that respondent may be reimprisoned by the federal government because of future misconduct is too attenuated to prevent mootness. See *Lane* v. *Williams*, 455 U.S. 624, 633 n.13 (1982); *Murphy* v. *Hunt*, 455 U.S. 478 (1982); *Weinstein* v. *Bradford*, 423 U.S. 147 (1975). See also *Iron Arrow Honor Society* v. *Heckler*, 464 U.S. 67, 70-73 (1983); *Vitek* v. *Jones*, 436 U.S. 407 (1978); *SEC* v. *Medical Committee for Human Rights*, 404 U.S. 403, 406 (1972); *Golden* v. *Zwickler*, 394 U.S. 103, 108-109 (1969); *Yun Cannon* v. *Breed*, 565 F.2d 1096, 1101 (9th Cir. 1977); *Allen* v. *Likins*, 517 F.2d 532, 534-535 (8th Cir. 1975); but cf. *Micklus* v. *Carlson*, 632 F.2d 227, 232-233 (3d Cir. 1980).

[5]Arizona's detainer was lodged explicitly under the IAD. It is clear that the IAD has no application to an individual who has been paroled. Articles III(a) and IV(a) of the IAD, 18 U.S.C. App. 2, at 545-546, have as a predicate that the detainer be lodged against a "prisoner" who is serving a "term of imprisonment" in a penal or correctional institution. The IAD speaks throughout of the "prisoner," his "term of imprisonment," the "State in which the prisoner is incarcerated," the "place of his imprisonment," and "the warden, commissioner of corrections, or other official having custody of [him]." Further, Articles III(a) and IV(b)

understand, moreover, that respondent is residing *in Arizona,* and there is nothing in the injunction that is the subject of the instant case to prevent the State—which is not a party to this action—from detaining him.[6] Consequently, whether the injunction at issue here stands or falls has no impact upon the parties; this case accordingly presents only a " 'question[] that cannot affect the rights of litigants in the case before' " the Court. *DeFunis* v. *Odegaard,* 416 U.S. 312, 316 (1974), quoting *North Carolina* v. *Rice,* 404 U.S. 244, 246 (1971). And, since this case does not involve a class suit, a challenged action of necessarily short duration, or a reasonable expectation that the controversy will arise for

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provide for certification "stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decision[s] of the State parole agency relating to the prisoner"; Article V(f) states that after the prisoner has been turned over to the receiving state, "time being served on the sentence shall continue to run but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the jurisdiction which imposed the sentence may allow." See *United States* v. *Reed,* 620 F.2d 709 (9th Cir.), cert. denied, 449 U.S. 880 (1980); *United States* v. *Dobson,* 585 F.2d 55 (3d Cir.), cert. denied, 439 U.S. 899 (1978); *State ex rel. Otterstetter* v. *McManus,* 309 Minn. 68, 69-73, 243 N.W. 2d 730, 731-733 (1976); Annot., 98 A.L.R. 3d 160, 185-187 (1980 & Supp. 1985) ("Validity, Construction, and Application of Interstate Agreement on Detainers").

[6]We are advised that the Arizona Court of Appeals has taken the position that it will not consider the State's appeal seeking reinstatement of the prosecution against respondent—dismissed by the trial court (see Pet. App. 37a-38a)—until the instant case is resolved, and the Arizona prosecutors have decided that they will not detain respondent until the court of appeals acts. This delay in the state criminal case proceedings is apparently due to the possibility that this Court would reach and decide the merits of the IAD issue in the instant case, thereby settling the merits of the Arizona appeal as well. The fact that nonparties choose to await its outcome, however, cannot keep an otherwise moot case alive. In any event, if the decision below is vacated by this Court as moot, that action itself would presumably revive the proceedings in the Arizona courts.

these parties again, it is not within the "capable of repetition yet evading review" doctrine. *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975). Accordingly, the case is moot. See *United States* v. *Alaska Steamship Co.*, 253 U.S. 113, 116 (1920).

The judgment of the court of appeals should therefore be vacated and the case remanded with directions to vacate the injunction entered by the district court. See, *e.g.*, *Great Western Sugar Co.* v. *Nelson*, 442 U.S. 92 (1979); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-41 (1950).

Respectfully submitted.

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Solicitor General

NOVEMBER 1985

DOJ-1985-11